MALAYSIAN AIRLINE SYSTEM BHD.

v.

MALINI NATHAN & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL APPEAL NO. 43 OF 1982]
5 APRIL 1985

CONTRACT: *Booking of flight - Checked in at appointed time - No seat available - Arranged to take next available flight - Respondents alleged breach of contract - Conditions of air ticket - Whether absolved appellant from liability - Article 19 of the Warsaw Convention.*

TORT: *Negligence - Failure to ensure that first respondent would have a definite seat.*

This is an appeal against the decision of the President of the Sessions Court wherein judgment was given in favour of the respondents. The facts of the case were as follows:

In 1976, the second respondent booked at Kuala Lumpur for a return ticket for first respondent to depart from Heathrow Airport London for Kuala Lumpur. The last confirmation of flight was made two weeks before the scheduled flight and the air ticket was issued less than ten days before the flight. The first respondent was told that there was no seat for her when she checked in at the airport. Eventually by arrangement made by the appellant, the first respondent left London on the following day on another flight. The respondents then sued for damages for breach of contract and negligence on the part of the appellant, and relied on Article 19 of the Warsaw Convention which states that the Carrier is liable for damage occasioned by delay in the carriage by air of passengers.

At the hearing, it was proved that there was a discrepancy in the name of the first respondent in the booking at Kuala Lumpur and the name in which the air ticket was issued at the request of the first respondent's representative in London. As such, the computer kept rejecting the name of the first respondent.

Held:

[1] The appellant's decision not to carry the first respondent on the flight was fully covered by condition No. 9 printed on the air ticket issued to the first respondent. What the appellant did or omitted to do was in accordance with the said condition and therefore there was no breach of contract on the part of the appellant. The respondents ought to have known the said condition as it was printed on the ticket. The confirmation of a seat must be understood to be subject to the said condition. No claim can succeed on the basis of confirmation of a seat especially in a case where such confirmations were made before the issue of the ticket.

[2] Even if it was true that the first respondent gave her name as Malini Nathan (the name in which the booking was made) at the checking-in counter and the appellant's representative failed to manipulate the computer accordingly, the appellant would still be absolved from liability for negligence in view of the said condition in the ticket.

[3] Article 19 of the Warsaw Convention applies in a case where under the contract of carriage the time for the carriage is fixed. The said Article must be read subject to Article 3 (2) which states that the passenger ticket shall constitute *prima facie* conditions of the ticket.

[Appeal allowed. President's judgment set aside. Respondents' claims dismissed. Costs to appellant.]

Legislation referred to:
Carriage by Air Act 1974, First Schedule art. 3(2), art. 19

For the appellant - Chin (Yahya with him); M/s. Tahir & Salleh
For the respondents - Joginder Singh; M/s. Joginder Singh & Co.

JUDGMENT

Wan Hamzah J:

This is an appeal against the decision of the President of the Sessions Court in Kuala Lumpur Special Sessions Court Civil Action No. 2552/1977. In 1976 the first plaintiff in that action was attending school at Cheltenham in England. Her parents were living in Kuala Lumpur. She was then 14 years old. In that year she was going to have school holidays beginning in March and she was to come back to Kuala Lumpur to spend the holidays with her parents. Her mother (the second plaintiff) booked at Kuala Lumpur for a return ticket for her to depart from Heathrow Airport London for Kuala Lumpur by Malaysian Airline System flight No. MH 893 on 26 March and to arrive in Kuala Lumpur on 27. On 26 the first plaintiff went to Heathrow Airport London to check in at the appointed time. At the Airport she was told by the MAS representative that there was no seat for her on flight No. MH 893. The plane departed and she was left behind. She was offloaded together with three other children. MAS representative offered to her accommodation at Sheraton Hotel, London, while arrangement was made for her departure to Kuala Lumpur by the next available carrier. But she preferred to go and stay with one Dr. Syed Mahmood and his wife who were then at the Airport to send off their children. At Dr. Syed Mahmood's house the first plaintiff spoke on the phone to her parents in Kuala Lumpur and informed them of what had happened. Her parents agreed that she should take the next available British Airways flight the next day. Eventually by arrangement made by MAS the first plaintiff left London on 27 by British Airways flight No. BA 930 and arrived in Kuala Lumpur on 28.

On 10 April 1976 solicitors for the second plaintiff wrote to the General Manager of the Malaysian Airline System Berhad (the defendant) in Kuala Lumpur to complain about the incident in London, and to inform about what happened to the second plaintiff at Kuala Lumpur as the result of the incident as follows:

> While all this transpired in London, our client and his wife were not kept informed by MAS of the change in flight. It was only after several hours of distress and anxiety that they were informed by a direct phone call from their daughter on her own initiative. This phone call was received at about midnight on 26 March 1976 informing her parents of the delay. Mrs. Nathan was terribly upset and worried for the safety of her daughter in the care of person/or persons unknown to her and she did not sleep the whole night. It upset her so badly that she did not eat for the whole of the following day that is 27 March.
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> Then at about 8 p.m. on the 27 March Mrs. Nathan was found missing from home. Dr. Nathan contacted all his friends to locate her whereabouts but in vain. At about midnight he rang up the hospitals and hotels in town. At 3 a.m. on 28 he rang up the police station at Jalan Travers and at 3.30 a.m. he went to the police station and met Inspector Del Akbar. The mobile police was alerted but till morning they still drew a blank as to her whereabouts.
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> At about 7 a.m. that morning, when Dr. Nathan was walking around his area in search for his wife, a boy approached him to say that there was a lady sleeping in an unoccupied house in the vicinity. The lady turned out to be Mrs. Nathan who appeared to be suffering from amnesia and shock. Dr. Nathan then sent her to a doctor for treatment and care as he was himself bordering on a physical and nervous breakdown after the traumatic events which took place.

You will no doubt appreciate that both parents and child suffered much distress and anguish as a result of your neglect.

The solicitors stated further that they had been instructed to sue for damages for the defendant's negligence, and enquired whether the defendant wished to give an explanation and whether the defendant was prepared to offer any reasonable compensation. The defendant company sent a reply to the solicitors dated 11 June 1976, denying liability. Hence the plaintiffs brought the action contending as follows:

(1) the defendant had confirmed that the first plaintiff had a definite and certain booking of a seat on the MAS flight No. MH 893 but the defendant in breach of the warranty and/or contractual obligation failed and/or refused to carry the first plaintiff on the said flight;

(2) in the alternative, the representation by the defendant that the first plaintiff had a definite and certain booking of a seat on the said flight was made fraudulently, in that the defendant knew that it was false, or was made recklessly not caring whether it was true or false;

(3) in the further alternative, the defendant's statement confirming a definite and certain booking of a seat on the said flight for the first plaintiff was false and was made recklessly by the defendant either well knowing that it would not be honoured or without caring whether or not it would be honoured;

(4) in the further alternative the failure and/or refusal of the defendant to carry the first plaintiff on the said flight was due to the defendant's negligence, particulars of which were stated as follows:

(a) not checking their passenger list well in advance of 26 March 1976 to ensure that the first plaintiff would have a definite seat on the said flight;

(b) confirming that the first plaintiff had a definite and certain booking of a seat on the said flight when there was none available;

(c) overbooking passengers on the said flight;

(d) refusing to carry the first plaintiff in preference to other adult passengers;

(e) feeding wrong information - "Nathan Malini" into the computer;

(f) failed to make out that "Malini Nathan" and "Nathan Malini" was the same person, namely the first plaintiff.

It was further contended in the Statement of Claim that by reason of the matters complained therein the plaintiffs had suffered loss and damage, and that on hearing of the first plaintiff's plight over the telephone the second plaintiff suffered nervous shock and required medical treatment and thereby suffered loss and damage. Particulars of the nervous shock were stated.

The defendant denied liability. With reference to the various particulars of the alleged negligence the defendant pleaded as follows:

Particulars (a): This was denied.

Particulars (b): This was denied.

Particulars (c): It was a normal practice of airlines to overbook during peak periods.

Particulars (d): This was caused by or contributed by the first plaintiff's negligence in that she had mislaid her ticket.

Particulars (e): and (f): The confusion was caused by the plaintiffs' agent, MPPM Travel Secretarial London, who had requested the defendant to issue the ticket in the name of "Nathan Malini" instead of "Malini Nathan" as she was booked in Kuala Lumpur, and the reservations card being reflected in the name of "Malini Nathan" the computer kept rejecting the name "Nathan Malini". This would not have arisen if the defendant were not misled by the plaintiffs' said agent.

The defendant also pleaded as follows:

(i) even if it was true that the defendant had confirmed a definite and certain booking of a seat on the said flight for the first plaintiff (which was denied), no contract of carriage could be made until the first plaintiff presented her ticket at the London Airport for the purpose of being allotted a seat on the said flight; and

(ii) even if the defendant has warranted that the first plaintiff had a definite and certain booking of a seat on the said flight (which was denied), the defendant contended that at the London Airport the first plaintiff was informed by the defendant that she would not be carried on the said flight and the refusal to carry the first plaintiff had prevented the making of a contract of carriage;

(iii) if a contract of carriage was made (which was denied), the conditions of contract on p. 2 of the ticket and the important notices on pp. 3, 5 and 6 would apply and the defendant relied on all the conditions of contract. The defendant also relied on the General Conditions of Carriage;

(iv) the first plaintiff had no remedy at law as he was provided with alternative transportation by the defendant, and her acceptance and use of rerouted ticket provided by the defendant constituted liquidated damages and she was barred from seeking further damages;

(v) the loss and damage alleged to have been suffered by the second plaintiff (which was denied) were too remote.

The President of the Sessions Court gave judgement in the sums of RM1,500 for the first plaintiff and RM500 for the second plaintiff, with interest @ 6% per annum and costs. The defendant appeals against the judgment.

I would like to deal first with the defendants's contention (iii) above. Condition No. 9 under the Conditions of Contract printed on p. 2 of the ticket is in the following terms:

> Carrier undertakes to use its best efforts to carry the Passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

In my judgment the defendant's decision not to carry the first plaintiff on flight No. MH 893 on 26 March was fully covered by Condition No. 9. What the defendant did or omitted to do was in accordance with Condition No. 9, and therefore there was no breach of contract on the part of the defendant. The plaintiffs ought to have known Condition No. 9 and they were presumed to have known it as it was printed on the ticket. Even if it was true that the defendant had confirmed or represented to the plaintiffs that the first plaintiff had a definite

and certain booking of a seat on that flight, it must be understood that such confirmation or representation was made subject to condition No. 9. Because it was made subject to Condition No. 9 it cannot be said that such confirmation or representation was made falsely or recklessly.

I have disposed of the plaintiffs' contentions (1),(2) and (3). I shall now consider their contention (4). As regards the particulars of negligence in contention (4):

(a) there was no evidence to show that the defendant did not check the passenger list in advance;

(b) as already stated, if there was confirmation that the first plaintiff had a definite and certain booking of seat such confirmation was made subject to condition No. 9;

(c) in view of condition No. 9 and the fact that all intending passengers were presumed to have notice of condition No. 9, it would not be an act of negligence on the part of the defendant to allow overbooking;

(d) in view of condition No. 9, it would not be an act of negligence on the part of the defendant to carry other passengers in preference to the first plaintiff.

As regards the particulars of negligence (e) and (f), reference has already been made to the defendant's allegation in the Statement of Defence that when booking was made in Kuala Lumpur it was made in the name of "Malini Nathan". There was no Reply filed by the plaintiffs to deny this allegation. Therefore it must be taken as an undisputed fact that the booking was made in Kuala Lumpur in the name of "Malini Nathan". The letter dated 17 March 1976 (at p. 12 in the Agreed Bundle of Documents) was a request from MPPM Travel Secretarial, London, to MAS for the issue of tickets for eight students, one of whom was "Miss Nathan, Malini". In the absence of other evidence to the contrary it should be accepted that pursuant to the request a ticket was issued in the name of Miss Nathan, Malini. As already stated, the defendant alleged in the Statement of Defence that the computer kept rejecting the name Nathan Malini. If the ticket was produced at the checking-in counter, naturally the name on the ticket, i.e. Nathan Malini, would be fed into the computer; and in view of the name Malini Nathan being recorded in the Kuala Lumpur reservation, the computer would naturally reject. But when giving evidence the first plaintiff stated that she gave her name as Malini Nathan, at the checking-in counter, implying that the name Malini Nathan should have been fed into the computer by the MAS representative and that if this was done the computer would confirm that there was a seat reserved for the first plaintiff on the flight. But the President in his judgment did not state whether he accepted the first plaintiff's allegation that she gave the name Malini Nathan at the checking-in counter. In fact the President did not deal at all with the issue raised by the plaintiffs in particulars of negligence (e) and (f) and did not make any specific finding on that issue. Unless there is a specific finding by the President that he accepted that allegation I do not think that there can be a proper finding of negligence under particulars (e) and (f). Moreover, even if it was true that the first plaintiff gave her name as Malini Nathan at the checking-in counter and the MAS representative failed to manipulate the computer accordingly, the defendant would still be absolved from liability for negligence in view of the condition No. 9.

The President of the Sessions Court found that there was a contract between the parties and that the defendant had breached the contract by failing to carry the first plaintiff on flight No. MH 893. In his judgment he stated: "To my mind, to confirm a seat on flight is a definite statement of fact whatever is stated in the ticket". In my view the confirmation of a seat must be understood to be subject to the said condition No. 9. No claim can succeed on

the basis of confirmation of a seat, especially in the present case where evidence shows that all confirmations were made before the issue of the ticket. According to the evidence of the second plaintiff the last confirmation was made two weeks before the scheduled flight on 26 March, whereas the letter dated 17 March at page 12 of the Agreed Bundle of Documents shows that the ticket must have been issued less than ten days before the scheduled flight. The ticket with the Condition No. 9 printed on it must be taken to have varied all confirmations made before it was issued.

In his judgment the President did not consider or make a finding on the issue whether at Heathrow Airport the first plaintiff produced her ticket to the MAS representative. When giving evidence the first plaintiff did not say categorically that her ticket was produced. She stated: "My ticket was brought by one of Dr. Mahmood's children by mistake. Dr. Mahmood's children got seats in the plane. In Kuala Lumpur MAS made out a new return ticket for me ... I never got my ticket back at London Airport."

The Warsaw Convention as amended at The Hague, 1995 has been made applicable to Malaysia as from 19 December 1974 by the Carriage by Air Act 1974 of Malaysia. The plaintiffs purported to rely on Article 19 of the Convention which is in the following terms:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage of cargo.

In my judgment Article 19 applies in a case where under the contract of carriage the time for the carriage is fixed. I have already shown that in the present case time for the carriage was not fixed in view of Condition No. 9 printed on the ticket, which provides *inter alia:* "Times shown in timetables or elsewhere are not guaranteed and form no part of this contract." Article 19 should be read subject to Article 3(2) which provides:

> The passenger ticket shall constitute *prima facie* evidence of the conclusion and **conditions** of the contract of carriage.

I underline the word "conditions" in order to lay stress on the point that the carriage is subject to the conditions stated in the ticket. In the present case one of those conditions was the Condition No. 9.

The appeal is allowed and the President's judgment is set aside. The plaintiffs' claims are dismissed. Costs to the appellant (the defendant) here and in the Court below.

Also found at [1985] 1 CLJ 340